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No. 82-1246.

In the Supreme Court of the United States.

OCTOBER TERM, 1982.

BOSE CORPORATION,
PETITIONER,
v.
CONSUMERS UNION OF UNITED STATES, INC.,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Motion for Leave to File Brief and Brief of the American Civil Liberties Union and the Civil Liberties Union of Massachusetts as Amici Curiae.

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Motion of the American Civil Liberties Union and the Civil Liberties Union of Massachusetts for Leave to File Brief as Amici Curiae.

The American Civil Liberties Union and the Civil Liberties Union of Massachusetts respectfully move for leave to file the attached brief as *amici curiae*. The respondent, but not the petitioner, has consented to the filing of this brief.

The American Civil Liberties Union (hereinafter "ACLU") is a nationwide, non-partisan organization of over 250,000 members. Founded over sixty years ago, ACLU is dedicated to preserving and protecting the fundamental principles embodied in the Bill of Rights. The Civil Liberties Union of Massachusetts (hereinafter "CLUM") is one of ACLU's state affiliates, a private, non-profit, membership-only organization

having approximately 9,500 members in the Commonwealth of Massachusetts. CLUM has as its purpose the preservation of rights and liberties protected both by the Constitution of the Commonwealth of Massachusetts and the Constitution of the United States. For a considerable time, both ACLU and CLUM have been actively involved in efforts designed to ensure that the people of the United States and of the Commonwealth have the broadest possible latitude within which to exercise their undoubted right to speak with impunity about all matters of public interest or importance.

Amici believe that the opinion and judgment of the district court in this case were in irreconcilable conflict with the overriding principle that speech on public affairs "should be uninhibited, robust and wide-open." *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964). The power of the Court of Appeals to remove that conflict by making an independent constitutional judgment that the record did not contain "clear and convincing" evidence of respondent's knowledge of falsity at the the time of publication, represents an important aspect of the protections for First Amendment rights this Court has historically endorsed. Indeed, independent review of "constitutional facts" and of the powers by which those facts are found is but a reflection of a reviewing court's obligation to ensure that constitutional principles are constitutionally applied. To entrust to the trial court near-final power to find the facts *and* to determine that the facts have been properly found would create a grave danger of erosion of constitutional rights through distorted fact-finding. Independent review of the type exercised by the Court of Appeals here is the only sure way to check that danger.

In sum, *amici* believe that resolution of the "procedural" issues riding on the surface of this case can have very important consequences for the substantive First Amendment rights those procedural issues concern. To present the foregoing views in this important First Amendment case, ACLU and

CLUM respectfully move for leave to file the attached brief as *amici curiae*.

Respectfully submitted,

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Brief of the American Civil Liberties Union of Massachusetts as Amici Curiae.

Interest of Amici.

The interest of *amici curiae* is set forth in the motion attached to this brief.

Statement of the Case.

Amici adopt the statement of the case presented by respondent, Consumers Union of United States, Inc., (hereinafter "CU").

Summary of Argument.

This is a case in which the United States District Court for the District of Massachusetts, after a lengthy bench trial, concluded that the First Amendment to the Constitution of the United States did not protect CU's use of the word "about" to describe the location from which the sound of musical instruments appeared to come when one listened to those instruments played through loudspeakers manufactured by petitioner, Bose Corporation (hereinafter "Bose"). In reversing that judgment, the United States Court of Appeals for the First Circuit concluded, after its independent review of the entire record, that the First Amendment did protect CU's use of the word because Bose had not proved by "clear and convincing evidence" that CU knew it was making a false statement of fact when that word was published (pp. 4-7).

In coming to an independent judgment that the record contained no "clear and convincing evidence" of CU's knowledge of falsity at the time the relevant word was published, the court of appeals exercised the proper scope of review in cases like this. As is discussed in Part IIA of this brief, the requirement that knowledge of falsity be proved by "clear and convincing evidence" is a requirement which stems directly from the First Amendment itself. Indeed, that requirement is an important element of the process by which speech protected by the First Amendment is separated from speech which is not.

Recognizing its obligation to ensure that constitutional principles are constitutionally applied, this Court has, on numerous occasions, reviewed the entire record in cases involving First Amendment freedoms to come to an independent constitutional judgment on the facts the record contains. Sometimes it has done so because the constitutional rule of decision would admit of no other approach. More often, it has done so because the rule of decision, although couched in fact-like form, was not fully self-defining and thus required an inde-

pendent constitutional judgment in order to ensure that speech had not been impermissibly penalized.

Undoubtedly, the process by which "constitutional facts" are found in the trial court has important consequences for the underlying constitutional rights at issue. The rule requiring proof by "clear and convincing" evidence in cases like this is an important part of that process. But application of the rule is not a ministerial task. The terms themselves contain no certain guide to their precise application and thus gain meaningful form only through application to individual cases. The obligation to ensure that constitutional principles are constitutionally applied thus requires exercise of independent judgment by a reviewing court so that the "clear and convincing" rule remains the barrier against erosion of the First Amendment freedoms it was designed to be (pp. 7-19).

Even if, unlike the "actual malice" standard it is designed to serve, the "clear and convincing" rule does not stem from the Constitution itself, Part IIB of this brief discusses why independent review of the type exercised by the court of appeals was nonetheless proper. The "clear and convincing" rule embodies a choice concerning the outcome of legal disputes, a choice based on the relative importance of the values those disputes involve. The need to ensure proper recognition of those values historically has triggered independent review by this Court of the basis for trial-court findings the "clear and convincing" rule governed. Indeed, the values inherent in the rule undoubtedly would be exposed to serious erosion were its execution left to the virtually unreviewable care of triers of fact, those whose conduct it is intended to guide (pp. 19-24).

Finally, Part III of this brief discusses the court of appeals' proper conclusion that the record in this case simply did not contain "clear and convincing evidence" of CU's knowledge of the falsity of the word "about." The trial court's contrary conclusion proceeded on its disbelief of one of CU's employees coupled with its belief that that employee was too intelligent to accidentally misuse the word. But disbelief of testimony does

not amount to affirmative evidence of a contrary fact, much less "clear and convincing evidence" of the type here required. Moreover, the CU employee whose testimony the trial court disbelieved was not the one who first used the relevant word. Finally, in relying on the ordinary meaning of the word "about," the trial court impermissibly substituted an objective standard of knowledge for the subjective standard the Constitution requires (pp. 24-27).

Argument.

I. Introduction.

After an "exceedingly protracted period of pretrial discovery" and after nineteen days of trial (App. X. 39), the United States District Court for the District of Massachusetts, sitting without a jury, concluded that CU falsely had used the word "about" in its six-hundred and fifty word article about Bose stereophonic speakers. The court appeared to conclude that CU should have used the word "across," for "across" the room or "along the wall," and not "about" the room, is where it found that the sound of musical instruments played through the Bose speakers had "wandered" (App. X. 141-142).[1] The court then concluded that CU knew that its use of the word "about" was false because Arnold Seligson, one of two CU employees who heard the wandering sounds, was too intelligent to "interpret[ ] a commonplace word such as 'about' to mean anything other than its plain, ordinary meaning." (App. X. 142.)

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[1] The word "about" appeared in the following sentence: "Worse, individual instruments heard through the Bose system seemed to grow to gigantic proportions and tended to wander about the room." (App. X. 49.) The court found that Bose had not proved that the phrase "seemed to grow to gigantic proportions" was false (App. X. 88-99). The court also found that the use of the verb "wander" was accurate (App. X. 102).

Subsequently, after another three days of trial, judgment in the amount of $115,000 entered in favor of Bose.[2]

In the main, the CU article at issue was a verbal translation of various aural phenomena experienced by CU's employees while listening to Bose speakers. As the district court itself seemed to recognize, such efforts at translation are bound to breed at least some imprecision (App. X. 87 & n.29). *See also* J.A. 328-330. Indeed, before concluding that the word "about" had been falsely used, the district court felt it necessary to create the lexicon it intended to use while analyzing the truth or falsity of the statements CU had made (App. X. 87-88). The court's perceived need to do so undoubtedly reflected the fact that "there are no words to describe all of the aesthetic aspects of sound." (J.A. 336-337 (Testimony of Amar Bose).)

The judgment in favor of Bose thus came as the result of an article which attempted to verbalize non-verbal phenomena. It came as the result of an article in which, because of the inherently subjective nature of any effort to verbalize non-verbal phenomena — particularly phenomena received from "unique and unconventional" stereo speakers (App. X. 43) — the statement at issue may well have been a statement of opinion and not of fact.[3] It came as the result of a statement which, in fact, may well have been true.[4] And it came as the result of a

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[2] With interest and costs, the total amount of the judgment exceeded $200,000 (J.A. 344-345).

[3] The court of appeals simply assumed for purposes of its decision that the statement was one of fact and not of opinion (App. X. 15-18, 20). That, as the court itself recognized, was a large assumption. The difference between hearing "instruments [which] tended to wander . . . about the room" and hearing, for example, "instruments which danced from place to place like a fawn through the green spring meadow" is the difference between someone who liked what he heard and someone who did not.

[4] Again, the court of appeals assumed for purposes of its decision that the statement was false (App. X. 19-20), although it expressly recognized that it may well have been true. *Id.* Once again, the court's ambivalence was appropriate. The record clearly reveals that there was some depth to the

conclusion by the district court that the "plain, ordinary meaning" of a "commonplace word such as 'about'" (App. X. 142) was too clear to admit of mistake.

Thus viewed, the district court's opinion and judgment are a paradox. On one hand, the court's unchallenged conclusion that Bose was a "public figure" for purposes of this action[5] necessarily was a conclusion that the First Amendment permitted — indeed, encouraged — speech about the Bose speakers which was "uninhibited, robust and wide-open [sometimes including] vehement, caustic and . . . unpleasantly sharp attacks." *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964). That, after all, is the guiding principle which the rules regarding liability of those who speak about "public figures" were designed to serve.

On the other hand, the judgment in this case is an implicit endorsement of an exceedingly narrow and crabbed view of what the First Amendment protects, a view at war with the basic principle discussed in *New York Times* itself. If permitted to stand, that judgment and the method used to reach it would shrink the boundaries of the First Amendment to an area encompassing only "an arid, dessicated recital of bare facts." *See Time, Inc.* v. *Johnston*, 448 F.2d 378, 384 (4th Cir. 1971). Indeed, in cases like this one where the "bare

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wandering heard by Seligson and the other CU employee who listened to the Bose speakers (J.A. 254-255, 342, 343; App. X. 100). Indeed, to the extent that the word "across" or the word "along" implies a strictly linear movement, that word was itself not a precise description of what the two men heard.

[5] Not having challenged the trial court's conclusion in the court of appeals, Bose cannot, and has not, challenged it here. Bose's decision reflects reality. As part of its marketing efforts, Bose solicited reviews of its speakers by professional reviewers and then publicly distributed some seven *million* copies of those reviews in order to convince individuals that they ought to buy the speakers it made (R.A. 43-44 & n.6). Bose itself thus aggressively sought to make the quality and performance of its speakers an issue for public comment, albeit public comment which it undoubtedly hoped would be uniformly favorable.

facts" require one to verbalize an auditory or other non-verbal sensation, that judgment would make dangerous any statement at all.

But the business of appellate courts — indeed, the chief reason for their very existence — is to correct judgments of liability which depart from the principles, general or specific, on which liability ought to turn. In this case, an important principle of liability is the requirement that knowledge of falsity be shown on the record by "clear and convincing" evidence. It simply was not. And neither the "clearly erroneous" standard embodied in Fed.R.Civ.P. 52(a) nor anything else prevented the court of appeals from saying just that. Indeed, any other conclusion would have a crippling effect on execution of the fundamental principles embodied in this Court's decision in *New York Times*.

II. The Court of Appeals Properly Made an Independent Judgment Concerning Whether "Actual Malice" had been Shown on the Record by "Clear and Convincing" Evidence.

A. *The Court of Appeals' Independent Judgment was Properly Exercised Because of its Obligation to Insure that Constitutional Principles are Constitutionally Applied.*

As it began the critical portion of its opinion, the court of appeals said that its proper "focus [was] on the district court's holding that Bose *proved by clear and convincing evidence* that CU published the words 'individual instruments . . . tended to wander about the room' with knowledge that they were false or with reckless disregard of their truth or falsity." Continuing, the court said:

> In performing this review we are not limited to the clearly erroneous standard of Fed.R.Civ.P. 52(a); instead, we

> must perform a *de novo* review, independently examining the record to ensure that the district court has applied properly the governing constitutional law *and that the plaintiff has indeed satisfied its burden of proof*. . . . At the same time, we recognize that we are in no position to consider the credibility of witnesses and must leave questions of demeanor to the trier of fact.

(App. X. 22-23) (emphasis added).[6]

As support for the proposition that it was required to examine independently the entire record, the court of appeals cited, among other cases, *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 285 & n.26 (1964); and *Time, Inc.* v. *Pape*, 401 U.S. 279, 284 (1971). Those citations were entirely proper and mark an appropriate place to begin.

As this Court will recall, the question presented in *New York Times* was whether the First Amendment permitted L.B. Sullivan, one of three elected commissioners of the City of Montgomery, Alabama, to recover a judgment for libel against the *New York Times* under the common law of Alabama, common law which permitted a finding of liability without any showing of fault and without proof that Sullivan had been expressly targeted in any of the published remarks. This Court concluded that the First Amendment did not permit such a judgment and, in the process, announced the now well-known rule of "actual malice" which governs recovery for libel by public officials.

This Court did not stop, however, with announcement of a general rule. After stating that reversal of the judgment was required because the just-announced liability rules had not

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[6] The emphasized language was not simply a casual phrase tucked into the middle of the court's opinion. The court said it was focusing on whether Bose had met its burden of proof at the beginning of its analysis (App. X. 22), in the middle of its analysis (App. X. 23, 25-26), and again at the end (App. X. 34). In addition, the authorities it cited for the scope of the review it was undertaking (App. X 23), all discuss the requirement of "clear and convincing" proof.

been followed, the Court said that, because a new trial might be sought, it was appropriate "to review the evidence in the . . . record to determine whether it could constitutionally support a judgment." *Id.* at 284-285. Explaining, it continued by saying:

> This Court's duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied. This is such a case, particularly since the question is one of alleged trespass across "the line between speech unconditionally guaranteed and speech which may legitimately be regulated." In cases where that line must be drawn, the rule is that we "examine for ourselves the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect."

Id. at 285 (citations omitted).

Following its independent examination, this Court concluded, among other things, that "the proof presented to show actual malice lacks the convincing clarity which the constitutional standard demands, and hence . . . it would not constitutionally sustain the judgment for respondent under the proper rule of law." *Id.* at 285-286.[7]

In *Time, Inc.* v. *Pape*, 401 U.S. 279 (1971), this Court reinstated a directed verdict for the defendant which the Court of Appeals for the Seventh Circuit had reversed. This time the issue was whether, given the evidence presented during the

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[7] This Court also concluded, again based on that independent examination, that the evidence was constitutionally "incapable of supporting the jury's finding that the allegedly libelous statements were made 'of and concerning'" Sullivan, notwithstanding the testimony of several individuals to the effect that they understood the statements in question to refer to him implicitly because of his official position. *New York Times Co.* v. *Sullivan*, 376 U.S. at 288-291 & n.28.

plaintiff's case-in-chief, a jury question existed concerning the "actual malice" of Time when it published an article about Pape. Again, this Court said that the scope of its review was premised on "the *settled principle* that '[i]n cases in which there is a claim of denial of rights under the Federal Constitution, this Court is not bound by conclusions of lower courts, but will re-examine the evidentiary basis on which those conclusions are founded.'" *Id.* at 284 (emphasis added) (citation omitted). It then reviewed in some detail the basis for the statements the Time article contained and, after that review, concluded that Time's "conduct reflected at most an error of judgment" which was not sufficient to send to a jury the question whether Time had published the article with "actual malice." *Id.* at 292.

In other libel cases, as well, this Court has engaged in the same, intensive, fact-bound review to determine whether clear and convincing evidence of actual malice was demonstrated on the record compiled below. *E.g.*, *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130, 156-158, 168-169 (1967); *Beckley Newspapers Corp.* v. *Hanks*, 389 U.S. 81, 83-84 (1967); *St. Amant* v. *Thompson*, 390 U.S. 727, 739-733 (1968); *Greenbelt Cooperative Publishing Association.* v. *Bresler*, 398 U.S. 6, 11 (1970); *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29, 54-57 (1971). *See National Association of Letter Carriers* v. *Austin*, 418 U.S. 264, 282 (1974).[8]

But the rule requiring independent examination of the entire record to determine whether speech is protected is not a rule unique to libel cases. Indeed that rule, as the cited cases recognize, generally manifests the important obligation this Court has, not only to announce constitutional principles, but to ensure that judgments are rendered in accordance with

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[8] Indeed, those who have, at times, disagreed with adoption of a prophylactic rule which might effectively ease, at least somewhat, the burden undoubtedly imposed on this Court by the requirement for independent review have adverted to the efficacy of that type of review as an argument against the prophylactic rule itself. *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 397-398 (1974) (White, J., dissenting).

those principles.[9] Chiefly for two reasons, that obligation often makes broad and independent review of the entire record unavoidable.

Sometimes independent review is required because the constitutional principle involved is itself so fact-sensitive that broad review is necessary for its very application. For that reason, only three months ago, this Court independently reviewed the record in a case which, like this one, came to it after a bench trial in the United States District Court. In *Connick* v. *Myers*, ___ U.S. ___, 51 U.S.L.W. 4436 (U.S., April 20, 1983) (No. 81-1251), the question was whether, and to what extent, the First Amendment limited the right of a public employer to discharge an employee for speech-related activity. Reversing a judgment in favor of the employee, this Court held that the district court erred in concluding that the employee's speech involved "matters of public importance and concern" and that it had imposed on the employer "an unduly onerous burden" to show that the reasons for discharge were unrelated to exercise of protected freedoms. *Id.* at 4437, 4439.

Again, however, this Court did not stop there. Instead, it went on to examine for itself the statements in issue and the circumstances under which they were made to reach the "independent constitutional judgment on the facts of the case" that the employer's discharge of the employee had been proper. *Id.* at 4439 n.10. It did so because the ultimate constitutional judgment turned on a proper resolution of the "balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Id.* at 4436, citing *Pickering* v. *Board of Education*, 391 U.S. 563, 568 (1968). *See also Branti* v. *Finkel*, 445 U.S. 507, 518 (1980); *Elrod* v. *Burns*, 427 U.S. 347, 367-368 (1976). Given the nature of the constitutional principle at issue, involving as

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[9] This Court's power, after all, is the power to correct "wrong judgments, not to revise opinions." *Herb* v. *Pitcairn*, 324 U.S. 117, 125-126 (1945).

it did a broad-gauge balance of differing interests, proper application of that principle necessarily required an extensive independent review of, and judgment on, the facts of the entire case.[10]

More commonly, however, independent review is required because the constitutional rule of decision, although couched in terms which, at first blush, appear relatively firm, certain and "factual," is not fully self-defining and thus gains life and meaning only by its application to the facts of specific cases. *See Culombe* v. *Connecticut*, 367 U.S. 568, 604-605, 622 (1961) (opinion of Frankfurter, J.). In both *Edwards* v. *South Carolina*, 372 U.S. 229 (1963) and *Cox* v. *Louisiana*, 379 U.S. 536 (1965), for example, the question was whether conduct the state had punished as a criminal "breach of the peace" nonetheless constituted a "peaceable assembly" fully protected by the First Amendment. To answer that question, this Court reviewed in substantial detail the evidence contained in the record and concluded for itself that petitioners' activity had been the kind of "peaceable assembly" the First Amendment was designed to protect.[11]

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[10] *See also Fiske* v. *Kansas*, 274 U.S. 380 (1927), a due process case, albeit a due process case clearly tinged with First Amendment principles. By its very nature, application of the Due Process Clause often requires a fact-sensitive and thorough review of the evidence in order to determine whether the action of the state in a given case has met constitutional requirements. *See, e.g., Drope* v. *Missouri*, 420 U.S. 162 (1975) (competence to stand trial); *Stovall* v. *Denno*, 388 U.S. 293, 301-302 (1967) (fairness of "show-up" after arrest); *Henderson* v. *Morgan*, 426 U.S. 637 (1976) (voluntariness of plea); *Haynes* v. *Washington*, 373 U.S. 503, 515-518 (1963) (voluntariness of a confession); *Moore* v. *Michigan*, 355 U.S. 155 (1957) (right to counsel and voluntariness of guilty plea); *Chambers* v. *Florida*, 309 U.S. 227, 228-229 (1940) (voluntariness of confession).

[11] In *Cox*, the relevant evidence itself was not free of substantial ambiguity, *Cox*, 379 U.S. at 543 n.7, and thus this Court was required to analyze the record in exacting detail in order to make its independent constitutional judgment. *Id.* at 545-549 & nn.9-12. *Compare Louisiana* v. *Cox*, 244 La. 1057, 156 So.2d 448 (1963) *with Cox* v. *Louisiana*, 379 U.S. 559, 586-597 (1965) (Clark J., dissenting).

Similarly, in *NAACP* v. *Claiborne Hardware Co.*, ____ U.S. ____, 50 U.S.L.W. 5122 (U.S., July 2, 1982) (No. 81-202), the issue was, in part, whether the damages suffered by the respondent as a result of petitioner's boycott had been "proximately caused" by unlawful activity or whether those damages resulted from activity the First Amendment protected. That issue was one of constitutional magnitude because of this Court's earlier holding, reaffirmed in *Claiborne*, that "the permissible scope of state remedies . . . is strictly confined to the direct consequences of . . . [violent] conduct, and does not include consequences resulting from associated peaceful picketing." *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 729 (1966). Proximate causation, although common grist for finders of fact, is by no means a self-defining concept. Because the existence or non-existence of that causation marked the dividing line between constitutional immunity and substantial tort damages, the obligation to insure constitutional application of constitutional principles thus made an independent judgment on the facts of the case inescapable. *See NAACP* v. *Claiborne Hardware Co.*, 50 U.S.L.W. at 5124 n.10, 5130 n.50.[13]

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[13] Other examples abound. In *Pennekamp* v. *Florida*, 328 U.S. 331, 335 (1946), the question was whether a newspaper editorial and cartoon constituted a "clear and present danger" to the orderly and fair administration of justice. *See also Eaton* v. *City of Tulsa*, 415 U.S. 697, 698 (1974); *In re Little*, 404 U.S. 553 (1973). In *Jacobellis* v. *Ohio*, 378 U.S. 184 (1964), the question was whether the pre-*Miller* standards for determining whether a work was obscene had in fact been met. In *Jenkins* v. *Georgia*, 418 U.S. 153, 160-161 (1974), the question was whether the post-*Miller* standards of "prurient interest" and "patent offensiveness" had been met. In *Hess* v. *Indiana*, 414 U.S. 105 (1973), the question was, in part, whether the words used were "fighting words." In *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940), the question was whether Cantwell's conduct was a "clear and present menace to public peace and order." In *Watts* v. *United States*, 394 U.S. 705 (1969), the question was whether Watts' comments at a public gathering amounted to a "threat" to the life of the President of the United States. And in *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503, 509 (1969), the question was whether there had been material and substantial interference "with the requirements of appropriate discipline in the operation of school."

The cited cases demonstrate the importance of distinguishing between "issues of fact that are here foreclosed and issues which, though cast in the form of determinations of fact, are the very issues to review which this Court sits." *Watts* v. *Indiana*, 338 U.S. 49, 51 (1949) (opinion of Frankfurter, J.); *accord Drope* v. *Missouri*, 420 U.S. 162, 175 n.10 (1975). Those cases show that the obligation to ensure constitutional application of constitutional principles cannot be avoided by articulating standards which break the ultimate principle down into constituent parts, labeling each of those constituent parts a "fact" and then repressing judicial review of the facts ultimately found so long as the fact-finder appeared to nod at the relevant standards. To do that — to reduce constitutional principles to an amalgam of discrete and all-but-unreviewable facts — would give rise to a clear danger that those principles might be frustrated by "distorted fact-finding." *Haynes* v. *Washington*, 373 U.S. 503, 516 (1963).[13] The power of a reviewing court to conduct an independent review and to reach its own constitutional judgment on the facts of the case thus is itself a substantial part of the process by which the lines separating protected speech from criminal or tortious behavior are staked. *Miller* v. *California*, 413 U.S. 15, 25 (1973). *See Jenkins* v. *Georgia*, 418 U.S. 153, 160 (1974); *Kois* v. *Wisconsin*, 408 U.S. 229, 232 (1972).[14]

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[13] That danger is not one which stems solely from fact-finding by juries. *See* Monaghan, *First Amendment "Due Process,"* 83 Harv. L. Rev. 518, 529 (1970). As the cases just discussed make clear, independent review has been undertaken when cases came to this court from state and federal bench trials as well as from state and federal trials by jury. *E.g.*, *Connick* v. *Myers*, ___ U.S. ___, 51 U.S.L.W. 4436 (1983); *NAACP* v. *Claiborne Hardware Co.*, ___ U.S. ___, 50 U.S.L.W. 5122 (1982).

[14] "Actual malice" necessarily is a "constitutional fact" no different than those just discussed. *See generally* Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 Sup. Ct. Rev. 191, 220. That standard requires, among other things, knowledge of "falsity." But "falsity" is not a unitary concept. *See, e.g.*, Restatement (Second) of Torts § 581A; *cf. Smith* v. *California*, 361 U.S. 147, 154-155 (1959). Here, difficult questions the court of appeals assumed away, *see* n.4, *supra*, included whether knowledge of imprecision, if imprecision there was,

If independent review of the entire record is often required to ensure that the "constitutional facts," *Kois* v. *Wisconsin*, 408 U.S. at 232, *see Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29, 54 (1971) (plurality opinion); *Ashe* v. *Swenson*, 397 U.S. 436, 443 (1970), on which liability turns do indeed exist, then surely independent review of the *process* by which those facts are found in the trial court is both necessary and proper. As this Court has recognized, that process is an important part of the protective fabric with which First Amendment rights are cloaked. *See Carroll* v. *President & Commissioners of Princess Anne*, 393 U.S. 175, 183 (1968); Monaghan, *First Amendment "Due Process,"* 83 Harv. L. Rev. 518, 534 (1970). *See generally Freedman* v. *Maryland*, 380 U.S. 51 (1965). Indeed, that process is one of the "sensitive tools" used to separate protected speech from unlawful activity. *Speiser* v. *Randall*, 357 U.S. 513, 525 (1958).

Proper allocation of the burden of proof is one important ingredient of the protection afforded to First Amendment rights in the fact-finding process. *Speiser* v. *Randall*, 357 U.S. at 525. An equally important component of that protection, however, results from the quantum and quality of proof which must be brought forward by the party on whom the burden reposes. As the court of appeals fully recognized in this case, *see* App. X. 26, the constitutional requirement of proof by clear and convincing evidence, *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 285-286 (1964), itself "serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision." *Addington* v.

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amounts to knowledge of "falsity" for purposes of applying the constitutional rule and whether the relevant knowledge must include knowledge of the defamatory innuendo — in this case that the sounds were "bizarre" and "grotesque" (App. X. 101, 105) — lurking in the words actually used. *See* Restatement (Second) of Torts § 580A, comment d. The latter question is particularly important in cases like this where the speaker uses words which expressly contradict the asserted innuendo. *See* App. X. 49 ("With orchestral music, such effects seemed inconsequential. But we think they might become annoying when listening to soloists."). *See also* App. X. 20 n.8.

Texas, 441 U.S. 418, 423 (1979). *See also In re Winship*, 397 U.S. 358, 363-364 (1970).

But the term "clear and convincing," like the term "clear and present danger" or the term "proximate cause" or the term "patent offensiveness," is not fully self-defining. To be sure, the terms provide a guide to appropriate decision-making and they show the general area of focus for proper fact-finding. *See Addington* v. *Texas*, 441 U.S. at 423-425; *In re Winship*, 397 U.S. at 370 (Harlan, J., concurring). A determination whether the standard has been met in a given case, however, ultimately is a value-laden decision which must be made only after the entire record has been canvassed.

Indeed, there is no other way to do it. Surely, the question whether "clear and convincing" evidence has been presented to the trier of fact is not itself a fact like the amount owed by one private partner in a retail shoe business to another. *Cf. Columbus Board of Education* v. *Penick*, 443 U.S. 449, 491 (1979) (Rehnquist, J., dissenting). How "clear," for example, must "clear" evidence be? How "convincing" must "convincing" evidence be? One cannot reduce the answers to those questions to a formula easily applicable always and ever. But the answers to those questions are enormously important for, in part, those answers mark the dividing line between speech which is protected by the First Amendment and that which is not. If constitutional principles are to be applied in constitutional fashion, then the reviewing court must have the ability to determine for itself whether the fact-finding process has proceeded in appropriate fashion. That, as stated, can only be done by taking an independent look at the entire record.

The issue thus posed by this case — whether Bose satisfied its burden of proving by clear and convincing evidence that CU knew its publication was false at the time that publication was made — is substantially different from the issue posed in the cases cited by Bose and decided by this Court over the past several years. *E.g.*, *Columbus Board of Education* v. *Penick*, 443 U.S. 449 (1979); *Dayton Board of Education* v. *Brinkman*,

443 U.S. 526 (1979); *Rogers* v. *Lodge*, ___ U.S. ___, 50 U.S.L.W. 5041 (U.S., July 1, 1982) (No. 80-2100); *Inwood Laboratories, Inc.* v. *Ives Laboratories, Inc.*, 456 U.S. 844 (1982); *Pullman-Standard* v. *Swint*, 456 U.S. 273 (1982).[15] In each of those cases, the question decided by the trial court was whether an individual or group did or did not have a certain "intent." The issue before this Court in each of those cases was whether the appellate court could review for itself the record compiled in the trial court and come to its own conclusions on that question notwithstanding the requirements of Fed.R.Civ.P. 52(a). Not at issue in any of those cases were the threshold questions whether the trial court correctly allocated the burden of proof or correctly determined that the quantum and quality of evidence adduced by the party having the burden met the relevant standard.

It is obvious, however, that the question whether the record contains the quantum and quality of evidence necessary to support a conclusion that a person did or did not have a given intent and the question whether that intent in fact existed are two entirely separate questions. *See, e.g., Columbus Board of Education* v. *Penick*, 443 U.S. 449, 468 (1979) (Burger, C.J., concurring).[16] Indeed, the difference between the two is what

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[15] This case is distinguishable at once from *Inwood* and *Pullman-Standard* because those cases involved questions of statutory construction alone. Resolution of the issues those cases presented thus did not mean the difference between preservation of a constitutional right and violation of it.

[16] This Court repeatedly has held that a finding is "clearly erroneous" when, "*although there is evidence to support it*, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395 (1948) (emphasis added). *Accord Inwood Laboratories, Inc.* v. *Ives Laboratories, Inc.*, 456 U.S. 844 (1982); *Pullman-Standard* v. *Swint*, 456 U.S. 273 (1982). As those words make clear, before arriving at a conviction that a mistake has been committed, the reviewing court must conclude as a preliminary matter that there is *some* evidence on the record sufficient to support the court's finding. In the vast majority of cases in which the fact at issue need be proved only by a preponderance of the evidence, this preliminary conclusion understandably is reached with little or no discussion by the re-

gives to the "possibility of mistaken fact-finding . . . inherent in all litigation" which this Court so fully discussed in *Speiser* v. *Randall*, 357 U.S. 513, 525-526 (1958). And if both questions were left to the near-final decision of the trial court, appellate review would lose much, if not all, of its role in assuring that First Amendment rights were fully and carefully protected.

Properly viewed, then, this case is not one in which the court of appeals manifested a belief that it was free to make up its own mind about the fact on which liability turned. *Cf. Pullman-Standard* v. *Swint*, 456 U.S. 273, 284-285 (1982).

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viewing court, because evidence of virtually any quality or quantity is capable of being found more persuasive by the fact-finder than evidence of any quality or quantity to the contrary. This characteristic of the preponderance of the evidence standard is true whether the fact at issue is the color of a traffic light or the existence of discriminatory intent under Title VII of the Civil Rights Act. In both cases, therefore, the only difficult question to be resolved by the reviewing court is whether the trial court decided that fact against the clear weight of the evidence — in other words, whether the trial court's finding was clearly erroneous. *See Pullman-Standard* v. *Swint*, 456 U.S. 273 (1982).

On the other hand, when the fact at issue must be proved by more than a mere preponderance of the evidence — by clear and convincing evidence — the first tier in the two-tiered process of inquiry just described achieves far greater significance. For the appellate court must in the first instance ask itself not merely whether there is *any* evidence on the record which, if believed, could tend to prove the fact at issue, but whether the evidence on the record as a whole is of a quality and quantity which is "clear and convincing." *See Santosky* v. *Kramer*, 455 U.S. 745, 764 (1982); *Addington* v. *Texas*, 441 U.S. 418, 424-425 (1979). As has been emphasized earlier, that is a question which is extremely important yet not easily resolved.

In this case, after a thorough review of the record in light of existing legal standards governing the meaning of "clear and convincing" evidence in the context of First Amendment cases, the court of appeals answered the first question in the negative. Accordingly, it was unnecessary for that court even to reach the question which would have brought into play the clearly erroneous standard of Fed.R.Civ.P. 52(a) — that is, whether, on the entire evidence, it was left with the firm conviction that the district court had been mistaken in concluding that CU published the words "instruments . . . tended to wander about the room" with knowledge that they were false or with reckless disregard of their truth or falsity.

Instead, the court of appeals reviewed the entire record to determine whether the existence of that fact was shown on the record by the quantum and quality of evidence the Constitution commands. Because the answer to that question determined whether CU's speech was or was not protected by the First Amendment to the Constitution, the case was a "proper" one for review of "the evidence to make certain that [the constitutional principles embodied in the "clear and convincing" rule] ha[d] been constitutionally applied." *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 285 (1964). In conducting that review and answering that question, the court of appeals thus was not bound by Fed.R.Civ.P.52(a). As will be demonstrated shortly, the constitutional judgment reached by the court of appeals after its review was surely correct.

B. *Even if the Rule Requiring Proof by "Clear and Convincing" Evidence is Not of Constitutional Dimension, the Court of Appeals Properly Exercised Its Independent Judgment to Determine Whether that Standard Had Been Met.*

As mentioned, earlier, the question considered by the court of appeals was whether the evidence produced by Bose satisfied the "clear and convincing" standard required by *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 285-286 (1964), in cases like this. Even if the "clear and convincing" rule does not derive from the Constitution itself, that question historically and properly has been viewed by this Court as one which did not bind a reviewing court to the confines of Fed.R.Civ.P.52(a).

At bottom, the requirement that knowledge of falsity be shown on the record by "clear and convincing" evidence represents a choice concerning who bears the risk of erroneous fact-finding. The common "preponderance of the evidence" standard "allows both parties to 'share the risk of error in roughly equal fashion.' . . . Any other standard expresses a

preference for one side's interests." *Herman & MacLean* v. *Huddleston*, ___ U.S. ___, 51 U.S.L.W. 4099, 4103 (U.S., January 24, 1983) (Nos. 81-680, 81-1076). *See also Santosky* v. *Kramer*, 455 U.S. 745, 755 (1982); *Addington* v. *Texas*, 441 U.S. 418, 423 (1979). But that preference is not a preference abstractly made. Instead, it represents a determination that the "social disutility" of an erroneous judgment penalizing speech is much greater than the "social disutility" of a wrong judgment in the speaker's favor. *In re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring); Schauer, *Fear, Risk and The First Amendment: Unraveling the "Chilling Effect,"* 58 B.U.L. Rev. 685, 702-703, 708-709 (1978).[17]

Denaturalization and deportation cases illustrate the point. In *Schneiderman* v. *United States*, 320 U.S. 118 (1943), this Court held that the government must prove its case with "clear, unequivocal and convincing" evidence, for "[w]ere the law otherwise, valuable rights would rest upon a slender reed, and the security of the status of our naturalized citizens might depend in considerable degree upon the political temper of majority thought and stresses of the times." *Id.* at 159. *Accord Fedorenko* v. *United States*, 449 U.S. 490 (1981); *Woodby* v. *Immigration & Naturalization Service*, 385 U.S. 276

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[17] The infrequency with which this Court has imposed the requirement of proof by "clear and convincing" evidence attests to the value of the interests it is designed to protect. In addition to the libel cases, the "clear and convincing" requirement appears to have a current life as an evidentiary rule in five other areas: revocation of parental rights, *Santosky* v. *Kramer*, 455 U.S. 745 (1982); denaturalization proceedings, *Fedorenko* v. *United States*, 449 U.S. 490 (1981); civil commitment proceedings, *Addington* v. *Texas*, 441 U.S. 418 (1979); the existence of an independent basis for an in-court identification after an identification at a tainted lineup, *United States* v. *Wade*, 388 U.S. 218 (1967); and certain disputes between states tendered to this Court for resolution under its original jurisdiction, *Colorado* v. *New Mexico*, ___ U.S. ___, 51 U.S.L.W. 4045, 4048 & n.13 (U.S., December 13, 1982) (No. 80, Orig.). In a non-evidentiary sense, the requirement has been applied to showings that the legislature intended to preclude all judicial review of an administrative action. *FTC* v. *Standard Oil Company*, 449 U.S. 232, 249 n.5 (1980) (Stevens, J. concurring).

(1966); *Costello* v. *United States*, 365 U.S. 265 (1961); *Chaunt* v. *United States*, 364 U.S. 350 (1960); *Nishikawa* v. *Dulles*, 356 U.S. 129 (1958); *Baumgartner* v. *United States*, 322 U.S. 665 (1944).

After announcing that standard, the Court reviewed for itself the evidence in the record and concluded that the standard had not been met. *Schneiderman* v. *United States*, 320 U.S. at 125, 144 (1943). Explaining its analysis of one aspect of the record which the Government urged was sufficient to support the judgment rendered by the court below, this Court said as follows:

> We do not say that a reasonable man could not possibly have found, as the district court did, that the Communist Party in 1927 actively urged the overthrow of the Government by force and violence. But that is not the issue here. We are not concerned with the question whether a reasonable man might so conclude, nor with the narrow issue whether administrative findings to that effect are so lacking in evidentiary support as to amount to a denial of due process. As pointed out before, this is a denaturalization proceeding in which, if the Government is entitled to attack a finding of attachment . . . the burden rests upon it to prove the alleged lack of attachment by "clear, unequivocal and convincing" evidence. That burden has not been carried. The government has not proved that petitioner's beliefs on the subject of force and violence were such that he was not attached to the Constitution in 1927.

Id. at 153-154.

The following term, in *Baumgartner* v. *United States*, 322 U.S. 665 (1944), this Court announced the principled basis for its conclusion that an appellate court's own view of the record determined whether "clear, unequivocal and convincing" evidence was present. This Court said:

> It is idle to try to capture and confine the spirit of this requirement of proof within any fixed form of words. The exercise of our judgment is of course not at large. . . . But we must be . . . watchful that citizenship once bestowed should not be in jeopardy nor in fear of exercising its American freedom through a too easy finding that citizenship was disloyally acquired. We have sufficiently indicated the considerations of policy, derived from the traditions of our people, that require solid proof that citizenship was falsely and fraudulently procured. These considerations must guide our judicial judgment. Nor can the duty of exercising a judgment be evaded by the illusory definiteness of any formula.

Id. at 676.

While suggesting that the question whether the rigorous standard of proof had been met was an "ultimate" fact which an appellate court was not bound to review in the manner it was compelled to review "subsidiary" facts, this Court admitted that the difference between an "ultimate fact" and a "question of law," if any, was not always easy to determine. Concluding its discussion of the matter, the court said as follows:

> Suffice it to say that emphasis on the importance of "clear, unequivocal, and convincing" proof . . . on which to rest the cancellation of a certificate of naturalization would be lost if the ascertainment by the lower courts whether that exacting standard of proof had been satisfied on the whole record were to be deemed a "fact" of the same order as all other "facts," not open to review here.

Id. at 671. That approach was reaffirmed most recently in *Fedorenko* v. *United States*, 449 U.S. 490 (1981).[18]

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[18] As this Court itself observed in *Pullman-Standard* v. *Swint*, 456 U.S. 273 (1982), the label "ultimate finding" is not a particularly helpful analytical

The "clear, unequivocal, and convincing" standard applied in the denaturalization cases did not stem from the Constitution itself. *Vance* v. *Terrazas*, 444 U.S. 252 (1980). *See Herman & MacLean* v. *Huddleston*, ____ U.S. ____, 51 U.S.L.W. 4099, 4103 (U.S., January 24, 1983) (No. 81-680); *Steadman* v. *SEC*, 450 U.S. 91, 102 n.22 (1981). Nonetheless, the values protected by that standard involved "judgments lying close to opinion regarding the whole nature of our Government and the duties and immunities of citizenship." *Baumgartner* v. *United States*, 322 U.S. 665, 671 (1944). As a result, however labeled, the "clear, unequivocal and convincing" rule is not a fact like the color of the traffic light at the time of the accident but "clearly implies the application of standards of law." *Baumgartner* v. *United States*, 322 U.S. at 651. *Accord Pullman-Standard* v. *Swint*, 456 U.S. at 288. Moreover, the phrase "clear and convincing" implies a "qualitative as well as a quantitative judgment." *See Santosky* v. *Kramer*, 455 U.S. 745, 764 (1982); *Addington* v. *Texas*, 441 U.S. 418, 424-425 (1979). *Cf. In re Winship*, 397 U.S. 358, 364 (1970); *Steadman* v. *SEC*, 450 U.S. 91, 98, 102 n.22 (1981). And that qualitative judgment, at least, cannot be reduced to "the illusory definiteness of a formula." *Baumgartner* v. *United States*, 322 U.S. at 676.

If the qualitative judgment embodied in the "clear and convincing" rule inherently escapes the "illusory definiteness" of reformulation, if its function as a bulwark against erosion of important rights would be seriously undercut by treating it as a "fact" like all others not open to review and if it is a finding which has no life independent of a legal standard, then surely independent review of the type undertaken by the court of

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tool. The real question in each case is whether the finding of the district court under review has a life independent of a legal standard or concept or whether that legal standard or concept is an indispensable element of the finding in question. *See generally Pullman-Standard* v. *Swint*, 456 U.S. at 286-287 n.19 (1982); *Helvering* v. *Tex-Penn Oil Co.*, 300 U.S. 481, 491 (1937); *cf. Fiske* v. *Kansas*, 274 U.S. 380, 385-386 (1927).

appeals here was proper. Indeed, only through such independent review is it possible to insure that the qualitative judgment the rule embodies does in fact protect the rights it is designed to serve.

III. The Court of Appeals Correctly Concluded that Bose Had Not Proved C[illegible]s Actual Malice by Clear and Convincing Evidence.

In carrying out its review of the record, the court of appeals summarized the evidence — all virtually uncontested — it considered in reaching the conclusion that petitioner had failed to meet its burden of proof. First, the court reviewed the evidence as to the state of mind of Seligson, one of the two engineers who conducted the relevant listening tests and upon whose written description of those tests the article was based. Even giving due regard to the district court's disbelief of Seligson's testimony that the words used in the article accurately described what he heard, the court of appeals properly concluded that "[t]he evidence presented merely shows that the words in the article may not have described precisely what the two panelists heard during the listening test. . . . Certainly this does not support an inference of actual malice." (App. X. 35.)

That conclusion is amply supported by cases this Court has decided. The district court's finding with respect to Seligson's "actual malice" was based on its finding that the word "about" was false coupled with (a) its disbelief of Seligson's testimony that he thought the word, in context, accurately described what he heard, and (b) its conclusion that he was too intelligent a person to equate the words "about" and "across" (App. X. 141-142). To the extent that the district court concluded that Bose's burden was satisfied by its disbelief of Seligson's testimony, the district court was wrong. As this Court held in *Nishikawa* v. *Dulles*, 356 U.S. 129, 137 (1958), clear and convincing evidence of a fact is not supplied by disbelief of testi-

mony concerning the non-existence of that fact.[19] To the extent that the district court relied on its conclusion as to the "plain, ordinary meaning" of the word "about" and on Seligson's being too intelligent to mistake that meaning, the court was using an objective test of Seligson's state of mind which is wholly incompatible with the "actual malice" standard applicable to this case as a whole. *St. Amant* v. *Thompson*, 390 U.S. 727, 731 (1968); *Garrison* v. *Louisiana*, 379 U.S. 64, 78-79 (1964).

The court of appeals also reviewed the evidence regarding the editorial procedures followed by CU in the course of preparing the article for publication. Despite the trial court's suggestion at trial that such evidence was irrelevant (J.A. 130-131), a brief look at that evidence reveals that it, too, was appropriately reviewed by the court of appeals to determine whether the burden of proving actual malice had been met. Seligson's written report of the phenomena he observed during the listening tests, the "report to editorial," was sent to CU's Editorial Department to assist it in preparing the article for publication (J.A. 125-126). Although the Editorial Department sent the manuscript to Seligson for his review, Seligson did not have final authority to approve its content prior to publication (J.A. 145-146). As the court of appeals recognized, during the course of this editorial process, "the [Editorial] Department changed Seligson's words that instru-

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[19] Disbelief of testimony concerning the existence of a fact is not affirmative evidence of the non-existence of that fact in any context. As the United States Court of Appeals for the First Circuit consistently has said, "however satisfied a court may be from the witness's demeanor or his demonstrated untruthfulness in other respects that certain testimony is false, it cannot use such disbelief alone to support a finding that the opposite was the fact." *Janigan* v. *Taylor*, 344 F.2d 781, 784 (1st Cir.), *cert. denied*, 382 U.S. 879 (1965). *See generally Moore* v. *Chesapeake & Ohio Ry.*, 340 U.S. 573, 576-577 (1951); *Beaumont* v. *Morgan*, 427 F.2d 667, 672-673 (1st Cir. 1970); *NLRB* v. *Gotham Industries, Inc.*, 406 F.2d 1308, 1310 (1st Cir. 1969); *Federal Insurance Co.* v. *Summers*, 403 F.2d 971, 974 (1st Cir. 1968); *NLRB* v. *Joseph Antell, Inc.*, 388 F.2d 880, 883 (1st Cir. 1968).

ments 'suffered [from] a tendency to wander around the room' to the statement ultimately published that instruments 'tended to wander about the room.'" (App. X. 33.) *See* J.A. 160-161. The manuscript prepared by CU's Editorial Department also was reviewed by Monte Florman, then CU's Associate Technical Director and one of Seligson's superiors (J.A. 130). Florman testified that, when conducting his review of the manuscript, he "never really pondered" the meaning of the word "about" as used in the relevant phrase (J.A. 219). *See* App. X. 34.[20]

The most that can be concluded from this evidence, said the court of appeals, "is that in reviewing the manuscript CU employees could have inquired more painstakingly into the precise language being used." (App. X. 34.) That conclusion, against the backdrop of this record, was surely proper. Indeed, it is quite similar to the conclusion reached by this Court itself in *Time, Inc.* v. *Pape*, 401 U.S. 279, 292 (1971), where, as here, the source materials on which the relevant article was based themselves were not free from ambiguity.[21]

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[20] In its brief and in its statement of the questions presented, Bose argues that it was improper for the court of appeals to consider Florman's testimony regarding his role in the editorial process because "[t]he District Court judge had found expressly that 'Florman's testimony is wholly untrustworthy and is not credible' (App. X163)." (Brief for Petitioner, pp. ii, 69.) This quote from the district court's opinion is taken out of its limited context and altogether misstates the district court's finding as to Florman's credibility. Florman testified on a number of subjects at trial, among them his observations during a listening test he conducted on the Bose 901's *after* Bose had complained to respondent about the article (J.A. 203-206). It was only Florman's testimony that he had heard "unusual auditory effects" during this post-publication listening test that the district court disregarded as not credible (App. X. 163). Florman also testified at some length as to the editorial procedures followed by respondent in preparing the article for publication. *See* J.A. 197-200, 214-219. Far from disregarding it, the district court explicitly accepted Florman's testimony as to the meaning of the word "about" in the context of the statement concerning wandering instruments (App. X. 103), and, indeed, directly quoted from Florman's description of the editorial process in its opinion (App. X. 167-168).

[21] Bose suggests that other evidence, neither relied on by the district court nor raised by Bose in the court of appeals, supports the finding that it

In sum, the court of appeals correctly concluded that neither the evidence as to the state of mind of Seligson, nor the evidence as to the editorial procedures followed by CU nor any other evidence on the record, taken by itself or cumulatively, was sufficient to prove with "convincing clarity" that the words at issue were published with "actual malice." A contrary conclusion would mean that the burden of proving knowledge of falsity by "clear and convincing evidence" could be shouldered by proof of little more than falsity alone. *But see* n.4, *supra*. That, of course, is the very result the "clear and convincing" standard was designed to prevent.

Conclusion.

Although this case involves on its face a question of procedure, the answer to that question is enormously important. As Justice Frankfurter put it forty years ago, the "history of

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established actual malice with clear and convincing proof (Brief for Petitioner, pp. 54-60). It does not. First, the fact that the listening panel used for conducting the special test on the Bose 901's was different from the panel used in conducting the separate "cricket test" described in the article simply is irrelevant to the question whether CU knew or acted with reckless disregard of whether the words "instruments . . . tended to wander about the room" accurately described what the panelists who, in fact, tested the Bose 901's heard. Second, the claim that Bose failed to play the recordings used during the special listening test through a conventional loudspeaker as well as through the Bose 901's would also be irrelevant to the actual malice issue if it were true. In fact, CU did employ a reference loudspeaker during the special listening test to "see what ordinary loudspeakers . . . would sound like under the same circumstances" (J.A. 101-103). Third, Bose's claim that actual malice can be inferred from CU's use of the word "instruments" in describing the wandering effect since Seligson and Lefkow testified that only the violin "wandered", is without merit. The district court ruled that CU "reported accurately that instruments . . . tended to wander. . . ." (App. X. 102.) Finally, the fact that CU did not identify the records it used in the listening tests when asked to do so by Bose *after* the article had been published is of no relevance whatsoever to CU's state of mind at the time the article was published. *See St. Amant* v. *Thompson*, 390 U.S. 727, 731 (1968); *Garrison* v. *Louisiana*, 379 U.S. 64, 74 (1964).

liberty has largely been the history of observance of procedural safeguards." *McNabb* v. *United States*, 318 U.S. 332, 347 (1943). The power and duty of a reviewing court to reach in a proper case its own judgment concerning whether constitutional principles have been constitutionally applied is an important ingredient of the strategic protection afforded to rights preserved by the First Amendment. It is an important ingredient precisely because it constitutes the only sound means by which often ambiguous rules of decision possibly can take on meaningful form.

In this case, the court of appeals utilized the scope of review historically reserved to an appellate court when constitutional judgments must be made and properly concluded that Bose had not satisfied its burden of producing "clear and convincing evidence" of CU's "actual malice." In so doing, the court of appeals did not invade the territory reserved to the trier of fact by Rule 52(a). As a result, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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